No. 12,227

IN THE

United States Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,
Appellant,

vs.

CECELIA J. WILSON,
Appellee.

On Appeal from the United States District Court for the District of Idaho, Eastern Division.

Honorable Chase A. Clark, Judge.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

Appellee has no disagreement or objection to the statement of the case as made by the appellant, which is found on pages 4 to 8 of the printed brief. However, the statement naturally is one based upon the assumption that the facts referred to therein as appearing in the record, support the appellant's theory

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(Note): All numbers contained herein such as 94, refer to the number of the page of the printed transcript of record unless otherwise specifically stated.

and refers to facts that it believes should be accepted by the Court, and has not taken into consideration the direct conflict in the testimony by the different expert witnesses and does not refer to the testimony as quoted in the opinion of the Court, T-14-15, nor does it refer to the fact that the unexpected snoring, coughing and violent exertion was such that the deceased was swallowing his tongue, T-94.

The appellee pleaded the issuance of the policy in payment of the premiums and the death by accident. The burden was upon the appellee to establish these allegations.

SUMMARY.

The appellant having admitted the issuance of the Policy and having pleaded specially that the death of the deceased resulted in such a manner as to be within certain exclusions of the policy, T-10, the burden was upon appellant to establish that defense.

The issuance of the policy, the payment of premiums and the death of the deceased are not disputed. The case under the existing law is to be determined by the Appellate Court as to whether the Findings of Fact T-22, are supported by any evidence. If the Findings are supported and not clearly erroneous, the conclusions of law and judgment are naturally correct.

POINTS AND AUTHORITIES.

I.

Rule 52 as amended, of the Federal Rules of Civil Procedure, is applicable in this cause and the Appellate Court will not set aside Findings of Fact unless clearly erroneous. Such portion of Rule 52 of the Rules of Civil Procedure as is applicable herein is quoted as follows:

> "(a) EFFECT. In all actions tried upon the facts without a jury OR WITH AN ADVISORY JURY, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*"

Occidental Life Ins. Co. v. Thomas, 107 Fed. (2d) 876 (see C.C.A. 9);

Friedman v. Decatur Corporation, 77 App. (D.C.) 326, 135 Fed. (2d) 812;

Webb v. Frisch, 111 Fed. (2d) 887;

Durkey v. Arndt, 138 Fed. (2d) 317;

Corbett v. Halliwell, 123 Fed. (2d) 331 (cert. denied) 315 U.S. 818, 62 Sup. Ct. 906, 86 L. Ed. 1216);

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Sapp v. Gardner, 143 Fed. (2d) 423 (C.C.A. 9);
Lowden et al. v. Hansen, 134 Fed. (2d) 348.

II.

The record showing a difference of opinion and a conflict between the different expert witnesses testifying on behalf of the parties, the trial Court had an opportunity to determine the credibility of the witnesses and the weight to be given to their testimony, the findings should not be disturbed if supported by any evidence.

Rule 52 of *Rules of Civil Procedure,* as amended, supra;
Blytheville Cotton Oil Co. v. Kurn, 155 Fed. (2d) 467;
U. S. v. Alum. Co. of Am., 148 Fed. (2d) 416;
Woods v. Fliss, 168 Fed. (2d) 614 (and cases cited under Point I supra).

III.

The law of the cases is to be determined by the law and the statutes of the State of Idaho.

Erie R.R. Co. v. Thompkins, 304 U.S. 64, 82 L.Ed. 1188, 114 A.L.R. 1487.

IV.

The death of the deceased was accidental.

Teeter et al. v. Dairymen's Coop. et al. (Ida.), 190 P. (2d) 687;

Rauert v. Loyal Prot. Ins. Co. (Ida.), 106 Pac. (2d) 1015.

V.

The Idaho Courts have repeatedly held that insurance policies must be construed strongly against the insurer and in favor of the insured and that where there are two constructions that may be placed upon the meaning of an accident policy, one of which will permit the insured to recover and the other not permitting such recovery, that the Courts must so construe the policy as to permit recovery. The Idaho Courts having so held, decisions from other Courts adopting this liberal construction are in point in the present controversy.

Rauert v. Loyal Protective Ins. Co. (Ida.), 106 Pac. (2d) 1015;

O'Neill v. N. Y. Life Ins. Co. (Ida.), 152 Pac. (2d) 707;

Maryland Cas. Co. v. Boise Street Car. Co. (Ida.), 11 Pac. (2d) 1090;

Kingsford v. Bus. Men's Assurance Co. (Ida.), 68 Pac. (2d) 58;

Sweaney & Smith et al. v. St. Paul Fire Ins. Co. (Ida.), 206 Pac. 178;

Watkins v. Fed. Life (Ida.), 29 Pac. (2d) 1007;

Stout v. Continental Life Ins. Co. (Ida.), 291 Pac. 1073;

Manufacturers Acc. Indem. Co. v. Dorgan, 58 Fed. 945;

Burr v. Com. Travs. Mut. Acc. Ass. Co. (N.Y.), 67 N.E. (2d) 248, 166 A.L.R. 762 (exhaustive note is found in the discussion of this question at page 473 of 166 A.L.R.);

Jensma v. Sun Life Ins. Co., 64 Fed. (2d) 457 (9th C.C.A.);

Beile v. Trav. Prot. Ass. Co. (Mo.), 135 S.W. 497;

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Georgia Casualty Co. v. Mills, 127 So. 555;

Sentinel Life Ins. Co. v. Blackmer, 77 Fed. (2d) 345, cert. denied, 80 L.Ed. 427;

Bankers Health & Acc. Co. of Am. v. Shadden, 15 S.W. (2d) 704;

Trav. Ins. Co. of Hartford v. Diner, 75 Fed. (2d) 3;

Meyer v. Fed. Cas. Co. (Ia.), 65 N.W. 328;

Browning v. Equitable Life Ass. Soc. of the United States (Utah), 72 Pac. (2d) 1060 (this case cited and approved by the Supreme Court of the State of Idaho in *Rauert v. Loyal Protective Assur. Co.,* supra).

VI.

The burden was upon the appellant to establish its defense that the exclusions in the policy defeated recovery.

O'Neill v. N. Y. Life Ins. Co. (Ida.), 152 Pac. (2d) 707.

ARGUMENT.

Appellee will follow the propositions of law set forth in her points and authorities in the order thereof and insofar as the propositions therein are argued specifically, the following Roman numerals correspond with the numerals under the points and authorities and contain the arguments of appellee on the propositions therein set forth.

I and II.

It is appellee's view that this case on appeal can and will be decided under Rule 52 (a) as amended of the Federal Rules of Civil Procedure and that the sole and only questions involved are whether or not there was or is any evidence to support the findings of the trial Court.

It will be noted that appellant in its specification of errors object only to Finding No. 3, T-20; Finding No. 12, T-21; Finding No. 7, T-20 and Finding No. 9, T-21. These specifications are found on pages 8 and 9 of appellant's brief.

This Court held in *Occidental Life Insurance Co. v. Thomas,* supra, an Idaho case, that the Court will not weigh the evidence and that the findings of the trial Court will only be set aside if no reasonable man could logically infer accidental death from the evidence. The Court's opinion, T-11-18, contains certain evidence that caused the Court to consider that it supported a finding that there was a death by accident. The Court saw and heard Dr. Call, Dr. Brothers and Dr. Graves who were the only witnesses who appeared in person and gave oral testimony. The other expert witnesses testified by deposition.

There is a direct dispute among the experts. However, a fair consideration of the experts used by appellant shows that they could not determine the death of deceased without an autopsy. The testimony of Dr. M. M. Graves, T-146:

> "Q. Assuming that he died at five a.m. April 8, 1948 in the light of that record from what cause could he have died?
>
> A. He could have died from cerebro-vascular thrombosis, embolism; coronary thrombosis, embolism or pulmonary.
>
> Q. Acute heart failure?
>
> A. That is possible.
>
> Q. Could the cause of his death be determined other than by autopsy?
>
> A. In my opinion, no." T-146.

(The first question quoted above refers to the date of death in 1948. This is an error as deceased died in 1947, but is immaterial whether it is typographical or counsel's error in submitting the question.)

Dr. Call performed the operation; was in constant attendance at the bedside of the patient and his testimony being direct and positive, the trial Court was certainly entitled to give it such weight as he thought it entitled to. The Supreme Court of Idaho has directly held in the cases cited, that a death under the circumstances of this case, is an accidental death, and in the case of *Teeter et al. v. Dairymen's Cooperative et al.,* supra, the Supreme Court of Idaho determined that an occlusion, thrombus or embolism could be an accident and quotes the testimony of two doctors as follows:

Dr. Call:

> "When a man gets a coronary occlusion, he has a sudden tremendous injury to his heart."

Dr. Pointdexter:

> "This man died of a cardiac accident and to be more specific, a coronary occlusion."

Dr. Call testified, T-94, "that the patient was swallowing his tongue", which was certainly a violent exertion that could, under the testimony of Doctors Call and Brothers, result in an accident. Dr. Brothers testified, T-33:

> "Q. Doctor, you say in this case the accident was not connected with the surgery?
> A. In my opinion, it was not."

Doctors Brothers and Call both based their opinion and their reasoning upon the proposition that the embolism could not have resulted from the hernia operation by reason of the time element.

Dr. Brothers, T-37:

"Q. You cannot say that it wasn't connected with this operation?

A. I do not think it was.

Q. You have no way of saying that?

A. Yes, this thing occurred too soon following the surgery to have been caused by it."

Whether or not the majority of Courts or doctors would agree with Dr. Brothers' testimony is beside the point. His background and qualifications, T-117-118, show that he is a competent, experienced physician and surgeon, and certainly a reasonable man would be justified in accepting his testimony.

Stress is laid by appellant upon certain questions propounded which contained a statement from text books that a certain percentage of deaths occur from pulmonary embolism following hernia operations and that, therefore, the Court was bound to find and believe that the insured's death and the embolism was the result of a hernia operation. Such questions and statements are misleading, and the percentage of deaths from pulmonary embolism following hernia is of no benefit whatever unless it is shown the number of hernia operations. This is shown by the first question and answer of Dr. Brothers on re-direct examination, T-139.

III.

The law of the State of Idaho controls in this case which is based upon diversity of citizenship. This is not controverted by appellant, and a discussion would not assist the Appellate Court.

IV.

Reference has heretofore been made to the case of *Teeter et al. v. Dairymen's Coperative et al.,* an Idaho decision. This decision is definite authority for the position of appellee, in contending that the death of the insured was a death by accident.

> "Death of truck driver from coronary occlusion precipitated by exertion of loading 60 to 80 pound ice cream packages on truck in performance of regular duties, thereby accelerating or aggravating pre-existing diseased condition of heart, resulted from 'accident arising out of and in course of employment' so as to entitle decedent's dependents to compensation. Code 1932, pp. 43-901 et seq."
>
> (From Syllabus 1.)

Rauert v. Loyal Protective Ins. Co. (Ida.) supra, justifies the decision of the trial Court in holding that the insured's death was accidental. This case involved a hernia operation, but the operation for hernia was performed after the exertion and not before. It certainly could not affect the principle involved.

It is appellee's view that the case of *O'Neill v. New York Life Ins. Co.* (Ida.), the same appellant settles the case insofar as defendant is concerned.

V.

It is appellee's position that appellant, in writing the policy of insurance issued to the deceased, was under the necessity of so wording a policy that it could be sold by the sales department and in many instances

successfully defended against by the legal department. If the appellant's construction of the policy is correct, under no condition could the beneficiary in the policy recover if an accident befell Mr. Wilson following his operation for the reason it contends that Wilson would not have been where he was without the operation and that therefore he could not have had the accident. If through some unfortunate accident the floor of his room in the hospital had fallen or the roof caved in, there could not be a recovery, because he should not have been there, except for his operation. The same would be true if he were being conveyed in an ambulance and was killed in a collision.

The qualifying words found in the limitations of the policy and sought to be used as a complete defense, were, of course, placed there by trained legal and medical experts, not with the thought of making their meaning clear to the average business man, but to lull him into a sense of security. As the Supreme Court of the State of Idaho in analyzing a policy of insurance in *Kingsford v. Business Men's Assurance Co.,* supra, reasoned that if a policy of insurance was intended to mean a certain thing that the policy would contain language that would show the condition, the Court saying:

> "Had it been the intention of the parties to this contract that exemption from payment of premiums was to be dependent on giving notice and making proof of disability, it would have been provided therein that failure to give the notice and make the proof while the policy was in force would terminate it."

Applying the same analysis, appellee contends if the policy issued to the insured and the exclusions of the policy were intended to bar recovery if insured died after any operation, no matter what the cause or if he died from pulmonary embolism, no matter what the cause, it would have said so. In *Manufacturer's Acc. Indemn. Co. v. Dorgan,* supra, ex-President and Chief Justice Taft said:

> "It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all language used to limit the liability of the company, strongly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer."

This case has been widely cited and quoted.

In *Beile v. Travelers Protective Assurance Co.,* supra, the insured died as a result of chloroform administered preparatory to a surgical operation. It developed in the postmortem that his heart and other organs were defective and that he was not in first class condition at all. However, the examination of a competent physician did not indicate such to be the case. What possible difference can there be whether chloroform or any sedative or any other treatment kills the insured unexpectedly, either before or after

his operation? The Court in discussing this phase of the matter said:

> "but the difference is one of degree only. In the Young case the lung was not strong enough to withstand the strain of the lift. In this case the heart was not strong enough to withstand the effect of the chloroform. In each case the organ affected was too weak, but in neither case did the person know of the weakness. In order for the rupture or dilation to have been the natural and probable consequence of the lifting of the mail sack or the administering of the chloroform, and therefore not an accident, it must have been a result which was expected, or one which ought to have been expected, and this could not be without he knew of the defects in his heart or other organs or they were so apparent to the ordinary powers or means of perception that he ought to have known of them. There is no pretense that such is the case here. Even his physicians, with their learning, subjected him to the usual examination without suspecting his terrible internal condition. We conclude that the trial court erred in holding as a matter of law that Beile's death was not by accident."

The authorities cited, together with the case of *Jensma v. Sun Life Insurance Co.* (C.C.A. 9) supra required the trial Court to hold that the beneficiary was entitled to recover. The giving of the sedative did not originate internally. It originated externally. The choking, coughing and snoring was unexpected and certainly violent and the results were tragic.

Insurance companies know when they issue these policies, that men will grow older, that they become more susceptible to death from every cause; that they are not as alert in avoiding accident; that they have operations from time to time and that death is inevitable. These are the arguments for the purchase of every type of insurance. They can determine with exactness the average length of life of all people. As said by one of the Courts, a man is not required to be a Hercules to secure insurance. Why does he pay for accident insurance? Because he is convinced by the logical reasoning of the companies selling this insurance that he is likely to die from accident at any time.

VI.

Appellee does not believe that it will be contended that the Idaho cases cited under this particular point hold other than that the burden is upon the appellant to establish by a preponderance of the evidence that the death, if caused by accident is within the exclusions of the policy where the exclusions are pleaded as a defense.

ANALYSIS OF BRIEF OF APPELLANT.

Appellee is not concerned with the question of whether death itself is an accident. That question is not before the Court. Appellee has proven that the death in this particular instance was an accidental death.

The main contention of appellant is that the exclusions in the policy prevent the beneficiary from recovering because of the fact that the insured was suffering from disease, bodily defects or infirmity, which directly or indirectly caused his death and in this connection numerous cases are cited, and the best that can be said for this contention is that appellant contends that its position is the better and the majority rule. Attention is called to page 36 of appellant's brief and to the following statement:

> "Further, the better and majority rule, where the policy contains only the coverage provision directly and independently of all other causes from bodily injury effected solely through violent and accidental means, is as follows: * * *"

Again on page 37 of its brief, appellant contends:

> "It is clear that since the policy at hand contains the exception excluding death which results 'directly or indirectly from infirmity of mind or body, from illness or disease', that even though the sedative was considered to have constituted an external injury, without the pre-existing thrombus death would not have resulted, and respondent cannot recover."

Agreeing for the purpose of argument, that this proposition is supported by respectable authority, it is not the law as laid down by the Supreme Court of the State of Idaho and is directly contrary to the holdings of the Idaho Courts as shown by the cases quoted

Appellant in concluding its argument cites the case of *New Amsterdam Cas. Co. v. Cora Belle Johnson*

110 N.E. 475 and quotes a portion of the Court's opinion in which the Court said:

> "* * * The apparent vice of it is that, if countenanced, it would inevitably result in the necessity of requiring constantly increasing premiums from the vast multitude of the laboring classes as well as the people of moderate means, who chiefly buy this character of insurance."

Counsel for appellee flatly disagrees with such reasoning. It merely shows that this particular Court was drawing conclusions and not deciding the case at bar upon the evidence. The vast multitude of laboring classes and people of moderate means, who buy insurance, will be greatly aided if the insurance companies are required to write their policies in their entirety so that their meaning will be clear and unambiguous and so that the insured or his beneficiary are not required to endeavor to construe the meaning of words that the Courts and lawyers cannot agree upon.

It is respectfully submitted that the judgment should be affirmed.

Dated, Pocatello, Idaho,
July 12, 1949.

B. W. Davis,
Attorney for Appellee.